BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

EDITH L. HIZEY	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,014,073
MCI	)	
Respondent	)	
AND	)	
	)	
ZURICH U.S. INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier appeal the July 26, 2006 Award of Special Administrative Law Judge Marvin Appling. Claimant was awarded benefits by the Special Administrative Law Judge (SALJ) after it was found that claimant suffered accidental injuries arising out of and in the course of her employment with respondent. The Appeals Board (Board) heard oral argument on October 20, 2006.

APPEARANCES

Claimant appeared by her attorney, R. Todd King of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Kim R. Martens of Wichita, Kansas.

RECORD AND STIPULATIONS

The Board has considered the record and adopts the stipulations contained in the Award of the Special Administrative Law Judge. The Board also considered the parties' stipulated average weekly wage information provided by letter to the Board on December 1, 2006.

ISSUES

Respondent, in its Application For Review, raises the following issues for the Board's consideration:

1. Should this claim be denied in total based on the recreational and social activity test set forth in K.S.A. 44-508(f)?

2. Did claimant sustain personal injury by accident arising out of and in the course of employment to all body parts alleged other than the left knee?

3. Does claimant prove timely notice to all non-left knee body part claims?

4. Was claimant overpaid temporary total compensation benefits?

5. Were excessive medical and temporary total compensation benefits paid claimant under preliminary hearing order?

6. Was claimant awarded medical benefits at preliminary hearing for body parts that were not causally related to the work injury and/or was the claimant awarded a change in physician to Dr. Murati when the judge did not have proper jurisdiction to order a change of physician and respondent/carrier was not given an opportunity to provide a list of three for a change of physician off of Dr. Dobyns and Dr. Jansson?

7. Claimant's entitlement to permanent disability compensation benefits-scheduled or general body disability?

8. Nature and extend [sic] of disability, if any, including, but not limited to, extent of permanent impairment of function, causation, lack of good faith, task loss and wage loss?[1]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary record contained herein, the Board finds the Award of the SALJ should be modified to award claimant a 12.5 percent permanent impairment to the left knee, but claimant is denied permanent disability compensation for the remaining alleged injuries.

Claimant works as a sales representative for respondent. That job requires that she be on the phone with customers, selling long-distance and local services. Claimant also faxes documents and helps other associates.

While claimant was at work on October 7, 2003, respondent sponsored a dance contest. Claimant testified that respondent sponsored these types of activities all the time. These "skits", as they are called, are held at respondent's place of business and are scheduled during business hours. These activities were designed to motivate the workers

[1] Application For Review at 2 (filed July 31, 2006).

and increase their productivity. The employees were not required to attend, but they were supervised by respondent's supervisory level employees and there was a financial incentive to participate.

While at the contest, claimant initially decided to not participate. But, after being encouraged by her peers to participate in the dancing, claimant agreed and started doing the "twist". While dancing, claimant's left knee gave out and she fell to the floor, striking her head and back. Claimant's supervisor and Terry Reese, the manager, were present when claimant fell. Claimant testified that she had pain in her left knee after she fell.

Claimant told Mr. Reese that she needed to go to the hospital, but refused his offer of an ambulance. Instead, claimant called her husband, who took her to Via Christi Riverside Medical Center. X-rays were taken at the emergency room and claimant was provided a brace for her left knee and leg. Claimant saw Mark S. Dobyns, M.D., on October 16, 2003. Dr. Dobyns released claimant to return to work the next day. But the next morning, claimant was unable to get out of bed and could not stand on her leg and foot.

Claimant contacted respondent and was scheduled for an appointment with board certified orthopedic surgeon Kenneth A. Jansson, M.D., who first examined claimant on November 12, 2003, for complaints to her left knee. Surgery was performed on claimant's left knee on December 2, 2003, consisting of an arthroscopic ACL reconstruction with allograft. Claimant was referred to physical therapy and fitted with a brace. Dr. Jansson last saw claimant on June 30, 2004, at which time her left knee was examined.[2] Claimant was released with limitations on kneeling, squatting and stair and ladder climbing.

Dr. Jansson rated claimant as having an 8 percent functional impairment to the left lower extremity, with this rating being determined pursuant to the fourth edition of the AMA *Guides*.[3] Dr. Jansson did not rate any other part of claimant's anatomy, as the only complaints to Dr. Jansson were to the left knee. The only time claimant mentioned any other part of her body was at the June 30, 2004 final examination, when she advised Dr. Jansson's physician's assistant that she was being treated by Dr. Murati for back problems.

Claimant's history is significant in that Dr. Jansson performed surgery on her right knee in 1996, at which time Dr. Jansson assessed claimant an 8 percent impairment to her right lower extremity. That injury, which happened while claimant was working for respondent, resulted in a settlement in 1997 based on a 14 percent impairment to the right knee. Claimant was examined by board certified orthopedic surgeon Edward J.

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[2] Dr. Jansson did see claimant on that date, but the examination was done by Dr. Jansson's physician's assistant. (See the office note of June 30, 2004, which is contained in Jansson Depo., Ex. 2.)

[3] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

Prostic, M.D., on July 18, 1997, regarding the September 21, 1995 injuries to her lower extremities. After that examination, Dr. Prostic assessed claimant a 25 percent permanent impairment to the right knee (5 percent of which preexisted) and a 10 percent impairment to the left knee, with a 2 percent impairment to the body for post-traumatic headaches, for a combined rating of 15 percent to the whole body. This was pursuant to the fourth edition of the AMA *Guides*.[4] Dr. Prostic did not examine claimant after the October 7, 2003 accident.

Claimant was referred by her attorney to board certified physical medicine and rehabilitation specialist Pedro A. Murati, M.D. Dr. Murati saw claimant on January 12, 2004, at which time she had complaints to her low back and left knee, numbness and tingling in both hands and pain in both hands with gripping. The history provided to Dr. Murati included injuries to claimant's right knee and bilateral upper extremities from the October 7, 2003 accident. Claimant told Dr. Murati that her back pain began one week after the accident. She also alleged an aggravation of her upper extremity problems from the use of crutches after the surgery. The history provided to Dr. Murati did not include a history of back pain before the October 7, 2003 accident. He acknowledged that an MRI taken in March of 2004 indicated degeneration in claimant's low back, which would have preexisted the October 2003 accident with respondent. He agreed that he did not have information regarding claimant's treatment for bilateral carpal tunnel syndrome preexisting the injury with respondent.

Dr. Murati was designated as the authorized treating physician after the preliminary hearing of February 5, 2004, before Administrative Law Judge Jon L. Frobish. At that hearing, claimant requested added medical care for body parts other than the left knee. Up to that point, respondent had only provided left knee care. The preliminary hearing transcript does not indicate a request for a change of treating physician. Judge Frobish granted claimant's request for treatment for "all symptoms related to the accident", and also appointed Dr. Murati as the authorized treating physician. That Order of Judge Frobish was appealed to the Board. The Board, in its Order of April 30, 2004, affirmed the ALJ's finding that claimant's accident arose out of and in the course of her employment. The Board refused to consider the dispute dealing with the appointment of Dr. Murati, finding it did not have jurisdiction to consider that issue on appeal from a preliminary hearing order.

Dr. Murati diagnosed claimant with lumbosacral strain with radiculopathy secondary to antalgic gait; left knee pain after the ACL reconstruction; and bilateral carpal tunnel syndrome, which he attributed to claimant's use of crutches and her typing on the job. He agreed the carpal tunnel syndrome was a preexisting condition, as claimant had suffered similar symptoms after her right knee surgery in 1996. But he testified that the use of crutches would cause an aggravation of that preexisting condition. Dr. Murati found

[4] AMA *Guides* (4th ed.).

claimant at maximum medical improvement (MMI) on March 2, 2005, at which time he assessed claimant a 28 percent impairment to the whole body pursuant to the fourth edition of the AMA *Guides*.[5] His final diagnosis included right ulnar cubital syndrome, an aggravation of right carpal tunnel syndrome, bilateral carpal tunnel releases, preexisting; low back pain secondary to a left S1 radiculopathy; status post left ACL reconstruction; and left patellofemoral syndrome. Dr. Murati was provided a task analysis by vocational expert Jon Edward Rosell, Ph.D., and determined that claimant had suffered a 100 percent loss of task performing abilities.

Claimant was referred by Dr. Murati to board certified orthopedic surgeon and hand specialist J. Mark Melhorn, M.D., for an examination on July 13, 2004. At that time, claimant had complaints of pain in both hands and both forearms. Claimant complained of reoccurrence of the upper extremity pain, having undergone previous bilateral carpal tunnel surgery with James L. Gluck, M.D., in 1993 and 1994. Dr. Melhorn compared the nerve conduction studies performed at his request in 2004 to studies done in May 1994 and on October 8, 1997. Dr. Melhorn testified that claimant suffered periods of increasing symptoms involving her right and left upper extremities and that those symptoms had fluctuated from time to time based on her physical demands. He considered those fluctuations to be a reasonable and natural course of her disease process for which she had originally sought treatment with Dr. Gluck. Dr. Melhorn noted a period of time in 2000 when claimant was on crutches and had increased symptoms which resolved or returned to baseline after the use of crutches ended. He stated the aggravations which occurred between October 2003 and January 2004 were temporary, rather than permanent aggravations. Dr. Melhorn found claimant at MMI on July 27, 2004.

Dr. Melhorn was presented a task list prepared by Dr. Rosell. Dr. Melhorn determined that claimant had lost the ability to perform 2 of the 26 tasks on the list for a 7.7 percent task loss. Utilizing the task list prepared by respondent's expert Steve L. Benjamin, Dr. Melhorn found a task loss of 2.3 percent, finding claimant unable to perform 1 of 43 tasks. His task loss opinion and his impairment opinion do not include consideration of claimant's use of crutches after the 2003 accident. He stated that bilateral carpal tunnel syndrome would normally result in a rating of 5 to 10 percent to each upper extremity, with a resulting whole body rating of between 6 percent and 12 percent.

Claimant was referred by respondent to board certified internal medicine and occupational medicine specialist Chris D. Fevurly, M.D., for an examination on July 15, 2005. Dr. Fevurly diagnosed claimant with an acute left knee ACL rupture for which Dr. Jansson performed reconstructive surgery. Dr. Fevurly found no electrodiagnostic evidence of recurrent carpal tunnel syndrome, with claimant's current symptoms being residuals from the earlier carpal tunnel syndrome release in 1993 and 1994. He assessed claimant a 7 percent impairment to the left lower extremity due to the surgery on claimant's

[5] AMA *Guides* (4th ed.).

left knee and a 5 percent lower extremity impairment for the residual paresthesias. He initially assessed a 5 percent impairment for claimant's low back complaints, but then changed his impairment opinion to a zero percent impairment, diagnosing claimant with a Category I impairment pursuant to the fourth edition of the AMA *Guides*. He considered his review of emergency room records from 2002, when claimant was complaining of low back pain, one, an incident on January 4, 2002, when claimant had a one-week history of low back pain from an apparent tailbone injury, and another on November 11, 2002, when claimant had a three-week history of low back pain from a possible kidney infection, as evidence of prior low back problems. Dr. Fevurly found it significant that the history provided to him by claimant was without prior low back problems. He testified the low back problems claimant was experiencing after the injury with respondent were the same as claimant had experienced before the accident. He also found it significant that Dr. Dobyns' notes do not mention back pain and Dr. Jansson's notes make no mention until the last examination.

Dr. Fevurly assessed claimant a 12 percent impairment to the left lower extremity for the injuries suffered with respondent on October 7, 2003. He acknowledged that claimant did not have a diagnosed back condition and she had no impairment or restrictions for her back before the accident with respondent. He initially agreed that claimant has a 5 percent impairment for her back condition, which is a Category ll lumbosacral impairment, but stated that the normal MRI with no neurological deficits would result in no restrictions on claimant for the back complaints. He also opined that claimant probably had degenerative disc disease as a natural consequence of living and aging and it likely preexisted the October 7, 2003 event. After being shown the task list of Mr. Benjamin, Dr. Fevurly determined that claimant had lost the ability to perform 5 of 42 tasks, for a 12 percent task loss.

In workers compensation litigation, it is the claimant's burden to prove her entitlement to benefits by a preponderance of the credible evidence.[6]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[7]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[8]

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[6] K.S.A. 44-501 and K.S.A. 2003 Supp. 44-508(g).

[7] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[8] K.S.A. 44-501(a).

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[9]

Whether an accident arises out of and in the course of a worker's employment depends upon the facts peculiar to that particular case.[10]

There is no evidence to contradict claimant's assertion that her fall on October 7, 2003, occurred "in the course of" her employment with respondent. The significant question in this matter is whether claimant's injuries arose "out of" her employment with respondent.

K.S.A. 2003 Supp. 44-508(f) states in part:

> The words, "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include injuries to employees while engaged in recreational or social events under circumstances where the employee was under no duty to attend and where the injury did not result from the performance of tasks related to the employee's normal job duties or as specifically instructed to be performed by the employer.

These activities had become a regular part of the employment with this respondent. The activities, organized by the employer, with prizes as incentives, were supervised by respondent's management team and the employees were encouraged to attend. The activities were always on company time and were held on respondent's premises. The Board finds that these activities, rather than being recreationally or socially motivated activities, were elevated to activities of employment with this employer. It is clear that these activities were beneficial to both the employer and the employees. The Board finds that claimant has proven that she suffered accidental injuries arising out of and in the course of her employment with respondent on October 7, 2003.

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[9] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

[10] *Messenger v. Sage Drilling Co.*, 9 Kan. App. 2d 435, 680 P.2d 556, *rev. denied* 235 Kan. 1042 (1984).

Respondent also alleges that claimant failed to provide notice of all claimed injuries except the injuries to claimant's left knee. K.S.A. 44-520 requires notice be provided to the employer within 10 days of an accident.[11]

As has been held many times in the past, the notice statute requires notice of an accident, not of specific injuries. Claimant's manager, Terry Reese, witnessed the accident and offered to call an ambulance for claimant. K.S.A. 44-520 states that "actual knowledge of the accident by the employer or the employer's duly authorized agent shall render the giving of such notice unnecessary." The Board finds that respondent had actual knowledge of this accident sufficient to satisfy the requirements of K.S.A. 44-520.

The SALJ awarded claimant benefits for a 20 percent whole body impairment of function, followed by a "50% work disability".[12] Respondent argues claimant's award should be limited to a scheduled injury under K.S.A. 44-510d, with the impairment limited to claimant's left knee only. When claimant was first provided treatment, the medical care was limited to her left lower extremity for the injuries suffered to her left knee. Claimant did not mention any other body part to Dr. Dobyns and failed to raise back complaints with Dr. Jansson or his staff until the last examination on June 30, 2004, after claimant had begun treating with Dr. Murati. Additionally, claimant has been shown to have suffered numerous prior injuries to her back, both knees and her hands and wrists.

Dr. Melhorn stated claimant's bilateral carpal tunnel syndrome preexisted her injuries with respondent and any symptoms to her upper extremities after the October 7, 2003 incident would have been only temporary. Dr. Fevurly initially assessed claimant a 5 percent impairment to her back. But after being shown information regarding previous problems, which claimant had earlier denied, he determined claimant had no impairment to her back from this incident. Dr. Prostic noted significant preexisting problems with claimant's knees, assessing a 25 percent permanent impairment to claimant's right knee and a 10 percent impairment to her left knee in 1997.

It is well established under the Workers Compensation Act in Kansas that when a worker's job duties aggravate or accelerate an existing condition or disease, or intensify a preexisting condition, the aggravation becomes compensable as a work-related accident.[13]

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[11] K.S.A. 44-520.

[12] Award at 5.

[13] *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978).

When a primary injury under the Workers Compensation Act arises out of and in the course of a worker's employment, every natural consequence that flows from that injury is compensable if it is a direct and natural result of the primary injury.[14]

In workers compensation litigation, it is not necessary that work activities cause an injury. It is sufficient that the work activities merely aggravate a preexisting condition. This can also be compensable.[15]

> Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.[16]

Here, the Board finds that claimant suffered permanent injuries to her left knee. The evidence fails to establish any permanent injuries to her hands, low back and right knee as a result of the accident on October 7, 2003. The Board finds that claimant is entitled to a 12.5 percent permanent partial impairment to her left lower extremity as a result of the injuries suffered on October 7, 2003.

Respondent argues that claimant was awarded temporary total disability and medical benefits for body parts that were not causally related to the work injuries. K.S.A. 44-510h(a) makes it the responsibility of the employer to provide medical services "as may be reasonably necessary to cure and relieve the employee from the effects of the injury". Respondent argues that claimant's treatment should be limited to the left lower extremity. However, the Board has found that more than just the left knee was injured on October 7, 2003. Claimant suffered temporary aggravations to her hands and upper extremities, low back and right knee. The Board acknowledges that these conditions preexisted claimant's work-related injury. However, an accidental injury is compensable even where the accident serves only to aggravate a preexisting condition.[17]

K.S.A. 44-510h does not limit medical treatment to permanent injuries. Even temporary aggravations entitle an injured worker to medical treatment and, if necessary, temporary total disability benefits. The Board finds that the medical treatment and temporary total disability benefits provided for the temporary injuries to claimant's upper

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[14] *Gillig v. Cities Service Gas Co.*, 222 Kan. 369, 564 P.2d 548 (1977).

[15] *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d 178 (1984).

[16] K.S.A. 44-510e(a).

[17] *Odell v. Unified School District*, 206 Kan. 752, 481 P.2d 974 (1971).

extremities, low back and right lower extremity were proper and necessary and related to this accident.

Respondent argues that Administrative Law Judge Jon L. Frobish erred in his February 9, 2004 preliminary hearing Order by authorizing Dr. Murati. Respondent alleges it was providing medical treatment with Dr. Dobyns and Dr. Jansson. Claimant then filed for a preliminary hearing, requesting treatment to body parts beyond her left lower extremity, but failed to request a change of treating physician. K.S.A. 44-510h states in part:

> (b)(1) If the director finds, upon application of an injured employee, that the services of the health care provider furnished as provided in subsection (a) and rendered on behalf of the injured employee are not satisfactory, the director may authorize the appointment of some other health care provider. In any such case, the employer shall submit the names of three health care providers who, if possible given the availability of local health care providers, are not associated in practice together. The injured employee may select one from the list who shall be the authorized treating health care provider. If the injured employee is unable to obtain satisfactory services from any of the health care providers submitted by the employer under this paragraph, either party or both parties may request the director to select a treating health care provider.[18]

Here, it is undisputed that respondent was continuing to provide ongoing health care to claimant for the left lower extremity injuries suffered on October 7, 2003. There was no claim that this treatment was unsatisfactory. The dispute at the February 5, 2004 preliminary hearing centered around whether claimant's other injuries, including those to her low back, right knee and bilateral upper extremities, arose out of and in the course of her employment with respondent.

K.S.A. 44-534a requires that at least seven days before a party files an application for preliminary hearing, written notice be given to the adverse party containing a specific statement of the benefit change being sought.[19] No such change of treating physician was requested by claimant before the February 5, 2004 preliminary hearing. Thus, for Judge Frobish to allow same would be error. Even if the change had been requested by claimant before the hearing, the statute sets out specific procedures to be followed before a new treating physician can be appointed.

Claimant's written notice of November 21, 2003, did request "provision of an authorized treating physician." At the time of the preliminary hearing, no treatment had been authorized for claimant's right knee, low back or bilateral upper extremities. As the

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[18] K.S.A. 44-510h(b)(1).

[19] K.S.A. 44-534a(a)(1).

Board has found these areas of the body were at least temporarily aggravated by claimant's injury, the providing of medical treatment was appropriate. The Board, therefore, denies respondent's request that Dr. Murati's treatment and subsequent referrals be determined to be unauthorized.[20]

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Special Administrative Law Judge Marvin Appling dated July 26, 2006, should be, and is hereby, modified to award claimant a 12.5 percent permanent partial disability to the left leg for the injuries suffered on October 7, 2003. An award is hereby made in accordance with the above findings in favor of claimant and against the respondent, MCI, and its insurance carrier, Zurich U.S. Insurance Company, for an accidental injury which occurred on October 7, 2003, and based upon an average weekly wage of $568.87 through April 24, 2004, and based upon an average weekly wage of $618.71 effective April 25, 2004.[21]

Claimant is entitled to 15.76 weeks of temporary total disability compensation at the rate of $379.27 per week totaling $5,977.30, followed by 29.29 weeks of temporary total disability compensation at the rate of $412.49 per week for a total of $12,081.83, followed by 19.37 weeks at the rate of $412.49 per week or $7,989.93 for a 12.5 percent permanent partial disability to the left leg, making a total award of $26,049.06, all of which is due and owing claimant and ordered paid in one lump sum minus any amounts already paid.

The record does not contain a filed fee agreement between claimant and claimant's attorney. K.S.A. 44-536(b) mandates that the written contract between the employee and the attorney be filed with the Director for review and approval. Should claimant's counsel desire a fee be approved in this matter, he must file and submit his written contract with claimant to the ALJ for approval.[22]

In all other regards, the Award of the Special Administrative Law Judge is affirmed insofar as it does not contradict the findings and conclusions contained herein.

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[20] K.S.A. 44-510j(h).

[21] The average weekly wage is $568.87 through April 24, 2004. Effective April 25, 2004, fringe benefits in the amount of $49.84 will be added to the average weekly wage, making a final average weekly wage of $618.71. (See Respondent's brief at 4.)

[22] K.S.A. 44-536(b).

IT IS SO ORDERED.

Dated this ____ day of December, 2006.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

The undersigned Board Member respectfully dissents from the opinion of the majority. K.S.A. 2003 Supp. 44-508(f) states in part:

> The words, "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include injuries to employees while engaged in recreational or social events under circumstances where the employee was under no duty to attend and where the injury did not result from the performance of tasks related to the employee's normal job duties or as specifically instructed to be performed by the employer.

Here, the claimant was by her own admission engaged in recreational and social activities organized by the respondent.[23] Claimant was under no duty to attend and would suffer no ramifications if she chose not to. The dancing activity being performed by claimant was not a task related to claimant's normal job duties and claimant was not instructed to participate in the dance activity by any of her supervisors.

[23] Discovery Depo. of Claimant (Jan. 16, 2004) at 29-30.

The Kansas Court of Appeals, in an unpublished opinion in *Dickerson*,[24] addressed this issue on appeal from the Board's decision.[25] The Board held the injury in *Dickerson* not compensable, and the Appeals Court affirmed that determination, although after utilizing a different analysis. The Board determined that the claimant in *Dickerson* failed to prove accidental injury arising out of and in the course of his employment when he was injured while sumo wrestling at a Christmas party. The Appeals Court, in its analysis, considered the three factors set forth in 2 Larson's Workers' Compensation Law § 22.01 (2000) and considered by the Board in its decision. The Appeals Court noted that Larson's found recreational or social activities to be connected to employment when:

> (1) They occur on the premises during a lunch or recreation period as a regular incident of the employment; or
>
> (2) The employer, by expressly or impliedly requiring participation, or by making the activity part of the services of an employee, brings the activity within the orbit of the employment; or
>
> (3) The employer derives substantial direct benefit from the activity beyond the intangible value of improvement in employee health and morale that is common to all kinds of recreation and social life.[26]

The Appeals Court also noted that Larson's treatise recognizes that these factors should be limited or excluded when different statutory provisions govern. Here, a different statutory provision was created in K.S.A. 2003 Supp. 44-508(f) as above shown.

Claimant was under no duty to attend the event and would suffer no ramifications if she elected to not attend. The injury did not arise from any task related to her normal job. And finally claimant was not instructed to participate by any supervisor. Her participation in the dance was done as a result of the encouragement of her peers.

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[24] *Dickerson v. A-1 Appliance Plumbing, Heating & Cooling, Inc.*, No. 92,730 (Kansas Court of Appeals unpublished opinion filed Feb. 4, 2005, *rev. denied* Sept. 22, 2005).

[25] *Dickerson v. A-1 Appliance Plumbing, Heating & Cooling, Inc.*, No. 1,014,645, 2004 WL 1517754 (Kan. WCAB June 25, 2004).

[26] *Dickerson v. A-1 Appliance Plumbing, Heating & Cooling, Inc.*, No. 92,730 (Kansas Court of Appeals unpublished opinion filed Feb. 4, 2005, *rev. denied* Sept. 22, 2005), citing 2 *Larson's Workers' Compensation Law* § 22.01 (2000).

> It is a fundamental rule of statutory construction, to which all other rules are subordinate, that the intent of the legislature governs if that intent can be ascertained.[27]

The legislative language in K.S.A. 2003 Supp. 44-508(f) is clear. Injuries suffered while engaged in recreational or social events are not compensable. This Board Member would apply K.S.A. 2003 Supp. 44-508(f) and deny benefits in this instance.

BOARD MEMBER

c: R. Todd King, Attorney for Claimant
Kim R. Martens, Attorney for Respondent and its Insurance Carrier
Marvin Appling, Special Administrative Law Judge
Thomas Klein, Administrative Law Judge

[27] *Matter of Marriage of Killman*, 264 Kan. 33, 955 P.2d 1228 (1998) (citing *City of Wichita v. 200 South Broadway*, 253 Kan. 434, 855 P.2d 956 [1993]).